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Honorable Carol Browner
Administrator
U.S. Environmental Protection Agency
401 M. Street
Washington, D.C. 20460

Anne Goode, Director
Office of Civil Rights (1201A)
US Environmental Protection Agency
1200 Pennsylvania Ave NW
Washington, DC 20460

Re: **Comments on Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits.**

Dear Administrator Browner and Ms. Goode:

In devising a comprehensive guidance to investigate Title VI complaints in the permitting area, the Environmental Protection Agency is metaphorically at the crossroads. The Agency has the extraordinary opportunity to set aside the ceaseless debate on the cause of environmental inequities and take remedial action which will have the direct effect of promoting effective strategies to reduce pollutants in impacted communities. It is no exaggeration to say that real lives depend upon the Agency's courage during this politically sensitive time.

An Agency's power manifests itself not only by what it mandates, but by what it tacitly allows. Specifically, despite ample regulatory discretion to address environmental justice concerns under existing environmental laws, in the absence of an explicit legal duty many state agencies have consistently failed to address continuing disparities. This makes the EPA's regulations and administrative proceedings under Title VI a critical legal avenue for residents in

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environmentally devastated communities. In response to numerous Title VI complaints, the Agency committed time and resources into devising a guidance for states in this politically difficult and technically complex area. However, a reading of the new Guidance leads to the inescapable conclusion that–despite the effort expended--the EPA will not deliver on its promise to ensure compliance with civil rights laws, nor will it comply with President Clinton's executive order on environmental justice.

A substantial part of the Guidance is devoted to the EPA imploring and cajoling recipients to do the right thing, to devise strategies to reduce pollutant levels in overburdened communities. Yet, just under the surface of this encouragement is a much stronger message: the regulated community is sure to understand from this guidance that the EPA will go to *extraordinary lengths* to avoid administering a Title VI remedy, either withdrawing funds or requesting the Department of Justice to seek injunctions. The EPA's trepidation is evident in the generous presumptions and ample procedural protections given the recipient in stark contrast to the lack of recourse available to the complainants. One can understand why the Agency would be hesitant to withdraw funds, with the potential consequences of reacquiring previously delegated permitting programs. Although this is a step the Agency may not relish taking, the fact remains that without a credible threat by the EPA to use Title VI, many recipients will continue to take actions that cause and contribute to oppressive environmental inequities.

Hopefully the EPA is willing to reconsider its position. With that in mind, I respectfully offer the following comments.

1. **"Adversarial" and the Double Standard**. In the Guidance, the EPA explains that the proceedings are not "adversarial" between the complainant and recipient and therefore the complainant has no right to appeal. However, the Agency employs a different standard to the recipient, affording it substantial procedural protections, including the right of appeal after an adverse decision. As a consequence of this discrepancy, a governmental entity's monetary interest ironically is given far more protection than private citizens' constitutional interests.

   The EPA's interpretation of Title VI administrative proceedings has far reaching consequences. In light of the current legal uncertainty pertaining to private rights of action under disparate impact regulations, and in the shadow of an increasingly hostile Congress, the Agency has effectively made the complainants' civil rights contingent upon the political will of the EPA from administration to administration. With a tentative legal, economic and political reality facing complainants, it is frankly disingenuous for the Agency to state that those who believe they have been discriminated against may proceed in court. Even if the courts (correctly) confirm the complainants' private right of action, many community residents do not have the resources to prosecute these court cases, much less to undertake the kinds of studies and sophisticated computer-generated

analysis that are likely to be required to prove a claim. Instead, they are completely dependent upon the EPA's obligation to ensure that its own recipients comply with Civil Rights laws.

2. **Independent Compliance Reviews**. In the Guidance, the EPA repeatedly asserts that it has a right to conduct a compliance review even if the complaint does not state a claim or the complaint is untimely filed. Pointing out the Agency's unquestioned authority to undertake compliance reviews is of little comfort to complainants and those similarly situated. As a practical matter, the EPA's Office of Civil Rights (OCR) is unable to timely investigate pending complaints, much less undertake independent *sua sponte* compliance reviews.

3. **No Permit Stay**. The Guidance states that the OCR will not consider a complaint until the permit has issued, and further that the submission of a complaint will not stay the permit. This means that the most meritorious Title VI complainants will nevertheless experience a substantial lag time and possibly irreversible impairment to their communities before any relief is provided. Considering the current backlog of cases, even the most flagrant violators can expect to continue plainly illegal practices for years, even decades, before any sanctions occur. Yet, in light of this troubling potential situation, the Guidance contains no provision to consider the stay of a new permit (and associated emissions increases) pending an investigation in cases which would warrant a temporary injunction in an analogous court proceeding.

4. **Area Specific Agreements**. The EPA encourages recipients to develop area-specific agreements which contain plans to eliminate or reduce existing disparate impacts. As an incentive, the EPA has indicated it will review such plans and if they meet certain criteria, they will be given "due weight" in a Title VI investigation. These types of recovery plans–with multiple stakeholder participation--are possibly the best means to accomplish real progress in impacted communities. The EPA should be commended in its continual encouragement of these voluntary arrangements. That said, however, the precise role the Guidance ascribes to such an agreement in the course of a civil rights investigation is both ambiguous and troubling.

What is "Due Weight"?

The Guidance suggests that unless certain criteria are met, plans "might not be sufficient to constitute an agreement meriting due weight." This suggests that "due weight" is a threshold rather than a range. This makes "due weight" operate like a presumption rather than a factor warranting typical evidentiary weight. This distinction is not merely academic. If a determination that an area specific agreement merits "due weight" precludes further inquiry into the recipient's actions, then operationally it is an

improper presumption of compliance with Title VI. For example, consider a hypothetical recipient who establishes an agreement that meets the "due weight" criteria because the plan it contains will optimistically result in some pollutant reduction over time. But the plan is mediocre at best and it is not as good as plans developed in other jurisdictions under similar scenarios. Nevertheless, if this plan meets the "due weight" threshold, the Guidance suggests that at that point the OCR will determine without further inquiry that the recipient is adequately responding to the disparate impact and therefore is not violating Title VI. In such a case, a mediocre plan operates just as effectively in a Title VI investigation as a much more comprehensive plan. If interpreted this way, the Guidance promotes the perverse incentive for recipients to do the minimum necessary to trigger the "due weight" determination and insulate the recipient from an adverse Title VI decision.

Subsequent Complaints.

The practical consequences of a threshold-type "due weight" standard are more disturbing considering the EPA's position that if a later-filed complaint raises allegations regarding "other permitting actions" by the recipient, the OCR will generally rely on the earlier finding (presumably of due weight) and dismiss the complaint. Not only does the existence of an area-specific agreement act as an evidentiary presumption in the current Title VI investigation but, remarkably, it effectively operates as *res judicata* or *collateral estoppel* in subsequent Title VI proceedings.

The Guidance goes on to limit this disturbing "due weight" provision by two exceptions: (1) for improperly implemented agreements; and (2) when circumstances have changed substantially so that the agreement is no longer adequate. The presence of these exceptions raise further ambiguity. Normally, one would presume that new permitting actions *per se* constitute a change of circumstances, as they typically result in substantially more (new) emissions into the impacted area. If this is the Agency's position, the Guidance should clarify that new permits, modifications or renewals that result in an increase in emissions categorically constitute "changed circumstances" such that the existence of an area-specific agreement no longer is entitled to "due weight."

However, if--as the Guidance suggests--newly issued permits with associated emission increases do *not* constitute significantly changed circumstances *per se*, this forces another important unaddressed question: to what extent will the Agency allow new emissions to consume any gains made by the reduction strategies in the area-specific agreement? The Guidance suggests that the agreement, overall, should operate to reduce/eliminate the disparity within a reasonable time. But if subsequent permitting activities allow additional pollutants into the overburdened area without constraint, then any promise of real world progress is illusory.

To remedy this problem, the EPA should require that subsequent permits may issue only if the new emissions (or impacts) from the facility are offset or mitigated *within the same impacted area* in a ratio greater than 1:1. This would allow newer cleaner facilities without compromising a recovery plan for the affected community. Project sponsors who participated in the area specific agreement and contributed to pollutant reductions should be given priority in subsequent permit proceedings to the extent allowable by law.

Complainant's participation in the Agreement.

The EPA Guidance specifies that such plans may be developed without consulting the complainant. However, often it is the complainants–typically organizations comprised of community residents--who better understand the scope and nature of the impacts. Thus, substantially greater weight should be given to agreements that are designed with the full participation of the complainant and those similarly situated. The Agency should make it clear that plans lacking input by the complainant will be viewed skeptically by the EPA, as this evidences a lack of engagement between the recipient agency and its constituents.

Criteria for assessing adequacy of an Area Specific Agreement.

Key terms of adequate plan criteria, such as reductions over a "reasonable time" and "significantly reducing impacts" are not defined. To be sure, these terms are difficult to define in the abstract because they are context-specific, e.g., "reasonable time" might depend on the severity of the problem. However, additional guidance can and should be given on this critical point. A useful benchmark would be to consider the extent to which the recipient is exercising its discretionary authority to minimize or eliminate adverse impacts the course of issuing permits. For example, if the recipient agency is expediting permits, or allowing favorable baseline determinations and emission factors (from the permit applicant's perspective), then the extent to which the recipient can be presumed to be attempting to reduce emissions is questionable. Accordingly, such actions suggest that recovery is not likely to occur within a "reasonable time" and any associated plan or agreement should not be given due weight. Conversely, a comprehensive plan that contains a detailed commitment by a recipient agency to use its authority to require an alternative site analysis, control emissions, and/or minimize facility-related impacts as much as possible might be considered to "significantly reduce impacts" and eliminate the disparity within a "reasonable time."

A technical problem left unaddressed by the Guidance is the method of measuring a plan's expected pollutant reductions to determine if the area specific agreement should be given due weight. Some strategies are likely to be inherently hard to measure. For

example, instead of involving pollution control equipment with continuous monitoring equipment, the reduction strategies might attempt to control fugitive emissions or non-point runoff by using better land management practices, buffer zones or even institutional controls under some circumstances. The EPA should make it clear that while such strategies are encouraged, the Agency will be conservative in estimating expected reductions because there is little or no margin for error in highly impacted communities.

Theoretically at least, recovery plans have the potential to protect communities if they are carefully designed and implemented. As a practical matter, however, given the EPA's apparent aversion to actually imposing a Title VI remedy, coupled with its position that permit denial is not an appropriate solution (see discussion below), all that remains is a very weak incentive for state agencies to develop token agreements that have no realistic prospect of significantly reducing or eliminating disparities.

5. **Standard Deviation:** There is a problem measuring the degree of disparity using a consistently applied standard deviation to all cases, even assuming a generous one from the complainants' perspective. Instead of imposing a rigid population-oriented statistical methodology, a standard should take into account the distinct vulnerabilities of any particular impacted community. For example, a less "extreme" disparity (statistically measured) should be sufficient to support a case of disparate impact when the pollutants of concern exacerbate asthma and there is an abnormally high rate of asthma in the affected community. This approach is more responsive to the context-specific nature of diverse environmental justice scenarios that exist throughout the EPA's jurisdiction.

6. **Considering only sources, stressors and impacts within the recipient's authority to determine a violation.** The EPA has noted that it will consider a wide range of background factors to determine if an adverse impact exists, but will consider the more limited factors "within the recipient's authority" to consider whether there is a Title VI violation. Although appearing logical on its face, this distinction might be too simplistic in practice. There is ample support for the position that there is extensive authority under existing environmental statutes (omnibus clauses, for example) to address a wide range of impacts, even matters that may appear to be outside the explicit jurisdiction of the regulatory agency. Thus, the EPA's Guidance should make it clear that if the recipient has discretion under the applicable statutes and regulations to require measures that would ultimately result in mitigation of an undesired impact, failure to use that discretion could support a finding of a Title VI violation.

7. **Using "significance levels" under applicable regulations to establish a benchmark for an "adverse impact".** The EPA Guidance suggests that where risks or other measures of potential impacts meet or exceed a relevant "significance level," the impact will be presumed adverse. While this is a good approach, the Agency should be careful that the converse assumption is not made, i.e., a presumption of no adverse impact if a

significance level is not exceeded. It is not unheard of for permit applicants and regulatory officials to manipulate baselines and emission factors to keep from triggering applicable significance levels. This risk is likely to be greater in those very cases that Title VI is designed to address, cases where regulatory agencies have an inappropriate bias in favor of the regulated community to the detriment of residents near the polluting facilities. Thus, even in cases where significance levels are *not* exceeded, the OCR should investigate further to determine whether the significance determination was made in a supportable manner. Even if made in a supportable manner, the OCR should also consider the context of the significance determination. For example, a community with troubling health indicators and/or expected emission increases from other facilities in the area makes the community more vulnerable to the emissions increase of any particular operation, albeit "insignificant" in isolation for regulatory purposes.

8. **Using compliance with NAAQS and other health-based ambient standards as presumptively protective.** Consistent with the approach taken in the *Select Steel* case, the EPA Guidance reiterates the position that if the area in question is in compliance with a health based standard, there is no "adverse" impact. The Guidance further suggests that if the investigation produces evidence that significant adverse impacts may occur, this presumption of no adverse impact may be overcome. In the context of the backlog of cases, intense political pressure from industry and some state regulators, budget constraints, this facile presumption is not only a recipe for regulatory inertia, but a convenient escape hatch as well. Moreover, since the complainant does not have standing as an "adverse party," and the recipient will not challenge such a finding, the OCR is in the awkward position of having to rebut its self- imposed presumption. This procedural deformity is a consequence of the Agency's curious attempt to cast the process as non-adversarial with respect to the complainant, while at the same time affording the recipient the protections (and more) of an adjudicative, adversarial process. Perhaps the better approach would be to recognize that the because the complainants' civil rights may have been violated by the recipient, the process is necessarily adversarial, even though the proceedings are labeled an administrative investigation. Moreover, since the recipient has significantly more resources than the complainant, the EPA should be extremely cautious in imposing procedural roadblocks that operate to leave the complainants without recourse.

If the agency is committed to using health-based standards to raise presumptions, it should avoid doing so when the standard applies to a large geographical area, such as an air shed. These general determinations–although perhaps appropriate for SIP planning purposes--may be virtually meaningless at the local level. Air sheds that are "in attainment" contain unhealthy hot spots that go undetected because of the placement of the monitors or because modeling methodologies are not completely reliable. They also do not take into account the localized effect of non-compliance, which is an unfortunate but common occurrence.

9. **The Role of Economic Development in Justifying Disparate Impact.** The Guidance suggests that broader interests such as economic development may be an acceptable justification for the disparate impact if the benefits are delivered directly to the affected population and if the broader interest is "legitimate, important *and* integral" to the recipient's mission (emphasis supplied). It is difficult to imagine that economic development would be an interest that is "integral" to the mission of an environmental protection agency, whether it is federal, state, local or tribal. If so, then the statement in the Guidance is a *non sequitur*. However, it is more likely that the Guidance specifically lists economic development as a type of justifying "broader interest" because the EPA anticipates justifying disparate impact on economic grounds. Therefore, it is important that the EPA provide better detail as to the precise role of economic development in order to allow adequate opportunity for public comment. The Guidance as proposed does not provide sufficient notice on this major point because the ambiguity generates additional unaddressed questions. For example, if an economic interest that is "legitimate" or merely "important" to the recipient's mission can support a justification if there are corresponding benefits, what kinds of benefits are sufficient and to what extent should benefits be delivered to the affected population? Hopefully, the Agency will make it clear that the promise of jobs to some community residents, alone, does not constitute a justification for imposing a disparate impact.

9. **Denial of a Permit is not an Appropriate Solution.** The EPA Guidance states explicitly that "it is expected that denial or revocation of a permit is not necessarily an appropriate solution, because it is unlikely that a particular permit is solely responsible for the adverse disparate impacts." By this surprising statement, the EPA makes it virtually impossible to successfully challenge the legitimacy of a permit proceeding (or other agency action for that matter) in light of Title VI. Consider the case of a flagrant violation: a hypothetical official advises a permit applicant that the agency will only grant a permit for a major facility if it is sited in an overburdened Latino community. This action is taken because the environmental agency doesn't want to contend with opposition from a White wealthy community situated near a more geographically appropriate site for the facility. Under the logic reflected in the Guidance, denial of the permit in this fictional case would *not* be an appropriate solution simply because the permit is not the "sole" cause of the impacts within the Latino community. No one discrete agency action is likely ever to be solely responsible for an adverse impact, but it does not follow that actions that contribute to disparate impacts should be allowed.

Instead of adopting this baffling position, the EPA should make it clear that a permitting agency's complicity in the unrelenting addition of new sources and facility expansions in an environmentally devastated area may make permit denial an appropriate solution in some cases. The EPA, in attempting to assuage the regulated community by categorically rejecting permit denial as a potential solution in a Title VI case, while at the same time sending a strong message that withdrawal of funds is unlikely to ever occur,

effectively decimates the authority of this Civil Rights law in the permitting context, and probably beyond that.

10. **Limited Role of an alternatives analysis**. The Guidance appears to limit the role of an alternatives analysis to rebutting a proffered justification. After (1) the EPA has made a finding of an adverse disparate impact (which is extremely unlikely given the interplay of presumptions created by the Guidance), and (2) the recipient offers a justification, only then is an alternatives analysis explicitly made relevant under the Guidance. First, familiar procedural complexities arise–who is going to step forward with a less discriminatory alternative if the complainant is not an adverse party? Equally important, however, is that the Agency has relegated an analysis of alternatives to a stage in the proceedings that the OCR is unlikely to ever reach. Consequently, if it continues to adhere to this Guidance, the Agency has squandered the opportunity to encourage recipients to use their considerable authority under existing environmental laws to engage in an analysis of alternative processes or sites in appropriate circumstances.

In my frequent dealings with the Environmental Protection Agency, I have been fortunate to encounter personnel who are sincerely committed to the principles of environmental justice. The Agency–as it should--has made an effort to communicate with all affected stakeholders in order to better understand the scope and significance of environmental inequities. More importantly, citizens from impacted communities generously gave their time and limited resources to this effort in the hope that Title VI could be developed into a viable, workable remedy for long standing disparities. Regrettably, the Guidance as proposed insidiously undermines the design and potential of Title VI. Although replete with precatory language giving lip service to the goal of reducing disparity, the Guidance in reality is a procedural stealth attack on environmental justice. Fortunately, countless remarkable individuals in impacted communities will continue to respond to actual conditions in spite of regulatory machinations, either at the state or federal level. Unfortunately, the EPA under the Draft Guidance is not only doing a disservice to its most important constituents, it is impairing its own legitimacy in the process.

Respectfully submitted,

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